

STATE OF WYOMING)
)
COUNTY OF GOSHEN)
)

IN THE DISTRICT COURT
ss.
EIGHTH JUDICIAL DISTRICT

STATE OF WYOMING, ex. rel. the)
 WYOMING ATTORNEY GENERAL)
)
 Plaintiff,) Civil Action No. _____
)
 vs.)
)
 HORSE CREEK CONSERVATION)
 DISTRICT, a Wyoming Irrigation)
 District; and PHASE 23, LLC,)
 a Wyoming Limited Liability)
 Company)
)
 Defendants.)
)
)

**STATE OF WYOMING’S BRIEF IN SUPPORT OF ITS MOTION
FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Plaintiff, State of Wyoming, by and through the office of the Wyoming Attorney General, and pursuant to WYO. R. CIV. P. 65 and WYO. STAT. ANN. §§ 1-28-101, *et seq.* submits this brief in support of its Motion for a Temporary Restraining Order and Preliminary Injunction. The State of Wyoming is entitled to enforcement of its perpetual public access that the Horse Creek Conservation District (“HCCD”) granted to the State of Wyoming and the public. The State of Wyoming seeks to enjoin the HCCD and Phase 23, LLC, from denying the public access to Hawk Springs Reservoir and the public and

private lands owned by HCCD and Phase 23, LLC, in and around Hawk Springs Reservoir (hereinafter referred to as “Hawk Springs State Recreation Area”). The State of Wyoming has filed a complaint against the HCCD and Phase 23, LLC, for declaratory judgment, injunctive relief and breach of contract.

INTRODUCTION

In February 1983, the Wyoming Legislature passed legislation (WYO. STAT. ANN. §§ 41-2-216 through 41-2-218) which created and funded a public recreation area at Hawk Springs Reservoir in Goshen County, Wyoming. *See* 1983 Wyo. Sess. Laws ch. 170. In pertinent part, the Wyoming Legislature loaned the HCCD \$1,975,000 and gave HCCD \$4,515,000 to engage in enumerated repairs and improvements to the Hawk Springs Reservoir and appurtenant irrigation structures. *See* WYO. STAT. ANN. §§ 41-2-217(a)(I) and 41-2-218(a)(I), (a)(ii).¹ In exchange, the HCCD agreed to “grant public access in perpetuity to the Hawk Springs Reservoir proper and to all adjacent lands owned by the district or the state for the purpose of hunting, fishing, and general recreation, including the construction of such facilities as deemed necessary by the Wyoming Game and Fish Commission to maximize the public enjoyment.” *See* WYO. STAT. ANN. § 41-2-218(b)(i)(G). The fact that both the State of Wyoming and the HCCD fully intended to create – and did create – a public recreation area at Hawk Springs Reservoir and upon State and private land owned by HCCD in and around the Reservoir cannot be disputed. In fact, WYO. STAT. ANN. § 41-2-217(a)(iii) explicitly provides that “[t]he Hawk Springs Project consists of the following components: . . . (iii) A public recreation area.”

¹ During the 1985 legislative session, the State subsequently granted HCCD an additional \$1,815,000 and loaned HCCD an additional \$226,000. *See* 1985 Wyo. Sess. Laws ch. 224.

Thereafter, the State of Wyoming and HCCD entered into binding contracts pursuant to WYO. STAT. ANN. §§ 41-2-216 *et seq.* These contracts, dated November 7, 1983, and April 1, 1985, both of which specifically reference WYO. STAT. ANN. §§ 41-2-216 through 218, provide that “the district will not deny right of access to the general public, for recreational purposes, to Hawk Springs Reservoir and adjacent public lands designated for recreational use . . .”

HCCD is in reality an irrigation district operating pursuant to statutory authority found at WYO. STAT. ANN. §§ 41-7-801 *et seq.* The “superintendent” or “manager” of HCCD is Ron Buchhammer.

Over the past several months, the HCCD and Phase 23, LLC, a limited liability company formed on June 12, 2006, and listing members of Ron Buchhammer and Dorothy Buchhammer, have structured real estate transactions to deprive the public of the perpetual public access they were granted with regard to Hawk Springs State Recreation Area in 1983. Specifically, on September 13, 2006, HCCD sold 40 acres of HCCD property to Phase 23, LLC, pursuant to a contract for deed. The contract for deed between Phase 23, LLC, and HCCD indicates that the 40 acres of land comprising the SW1/4SE1/4, Section 9, Township 20 North, Range 61 East, 6th P.M., Goshen County, was sold for \$300 per acre (total sales price of \$12,000). The terms of the contract further provide that a \$300 down payment was made on or about September 13, 2006, no additional payments are due for the first year of the contract, and if there is a default during the first three years of the contract, HCCD will repay all monies paid by Phase 23, LLC, in relation to the contract. Curiously, HCCD also agrees to indemnify Phase 23, LLC, should any lawsuit arise in relation to the contract for deed. The contract for deed was executed by Lon Eisenbarth, president of HCCD on behalf of HCCD, and by Ron Buchhammer, on behalf of Phase 23, LLC.

Both HCCD and Ron Buchhammer, on behalf of Phase 23, LLC, executed waivers

of conflict of interest acknowledging that Cheyenne attorney Curtis Buchhammer was conflicted in providing advice to both HCCD and Phase 23, LLC, with regard to this transaction.

On or about September 23, 2006, employees of Phase 23, LLC, and/or HCCD placed a barbed wire gate across the only road providing public access to Hawk Springs State Recreation Area. This gate, which is padlocked, and which totally prevents the public's access to Hawk Springs State Recreation Area and associated public improvements, including a boat ramp, campground sites, restroom facilities, etc., sports signs advising the public that they must "Keep Out" and that to go further on the road they would be entering private property where no trespassing is allowed.

On September 25, 2006, Curtis Buchhammer wrote a letter to the Wyoming Game and Fish Department and the Division of State Parks and Cultural Resources notifying those State agencies that HCCD had sold certain identified property to Phase 23, LLC, and that "to the extent the public was using any portion of the described property to access the reservoir, or using any of the described property for public recreational purposes, those activities must be terminated."

The public has been denied access by HCCD and Phase 23, LLC, since at least September 23, 2006, to Hawk Springs State Recreation Area, an area to which the State of Wyoming was granted "perpetual public access." While the present commissioners, directors and/or employees of HCCD may not like the agreements made by the HCCD with the Wyoming Legislature in 1983 and 1985, they are not at liberty to ignore Wyoming law or the binding agreements. HCCD and Phase 23, LLC, cannot be allowed to deny the public the benefits of what Wyoming taxpayers allocated over \$8,500,000 to purchase. This Court must grant the State of Wyoming a temporary restraining order and preliminary injunction ordering the removal of the gate and further interference by either HCCD or Phase 23, LLC, and their successors and assigns with the public's access to

Hawk Springs State Recreation Area as specifically delineated in WYO. STAT. ANN. §§ 41-2-216 through 41-2-218 and enter a permanent injunction against such further interference.

STATEMENT OF FACTS

The State of Wyoming adopts and incorporates the facts, including all exhibits, set forth in the State of Wyoming's Complaint for Declaratory Judgment, Injunctive Relief and Breach of Contract filed contemporaneously with this brief.

ARGUMENT

THE STATE OF WYOMING IS ENTITLED TO A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

WYO. STAT. ANN. § 1-28-102 provides, in part:

When it appears by the petition that the plaintiff is entitled to relief consisting of restraining the commission or continuance of some act the commission or continuance of which during the litigation would produce great or irreparable injury to the plaintiff, or when during the litigation it appears that the defendant is doing, threatens to do, or is procuring to be done some act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, a temporary order may be granted restraining the act.

The Wyoming Supreme Court has stated:

Although actions for injunctive relief are authorized by statute, Wyo. Stat. §§ 1-28-101 to -111 (1988 & Supp.1996), they are, by nature, requests for equitable relief which are not granted as a matter of right but are within the lower court's equitable discretion. *Rialto Theatre, Inc. v. Commonwealth Theatres, Inc.*, 714 P.2d 328, 332 (Wyo.1986). Injunctions are issued when the harm is irreparable and no adequate remedy at law exists. *Id.*; *Gregory v. Sanders*, 635 P.2d 795, 801 (Wyo.1981). Injunctive relief is appropriate when an award of money damages cannot provide adequate compensation. *Rialto Theatre, Inc.*, 714 P.2d at 332. An injury is irreparable “where it is of a “peculiar nature, so that compensation in money cannot atone for it.” *Gause v. Perkins*, 56 N.C. 177 (1857).’ *Frink v. North Carolina Board of Transportation*, 27 N.C.App. 207, 218 S.E.2d 713, 714 (1975).” *Gregory*, 635 P.2d at 801.

Weiss v. Pedersen, 933 P.2d 495,498-99 (Wyo. 1997).

In this case the ongoing harm to the State of Wyoming and its citizens is irreparable, immeasurable and cannot be remedied by an award of money damages.

**THE HARM TO THE STATE OF WYOMING AND ITS CITIZENS IS
IRREPARABLE AND IMMEASURABLE AND CANNOT BE REMEDIED BY AN
AWARD OF MONEY DAMAGES**

Defendants continue to deliberately deny the public access to Hawk Springs State Recreation Area. As a result, the State of Wyoming and its citizens have and continue to suffer as the HCCD and Phase 23, LLC, have structured real estate transactions to intentionally prevent Wyoming's citizens from using and enjoying Hawk Springs State Recreation Area. HCCD and Phase 23, LLC, cannot be allowed to deny the public the benefits of what Wyoming taxpayers allocated over \$8,500,000 to purchase - perpetual access to use and enjoy Hawk Springs Reservoir and all adjacent lands owned by the HCCD and the State. The Wyoming Supreme Court has stated that “the traditional office

of injunction has been to protect property rights.” *Weiss v. Pedersen*, 933 P.2d 495, 499 (Wyo. 1997)(quoting 42 AM.JUR.2d *Injunctions* § 69 at 814 (1969)). In the context of granting injunctions to protect property rights the Wyoming Supreme Court specifically held that:

Equity extends appropriate injunctive protection to property rights and interests of every description, whether the property is real or personal, although it is more frequently used in the case of real property. Jurisdiction to prevent threatened disturbance of the peaceful use and enjoyment of real property is inherent in a court of equity, and injunction is a proper and ordinary remedy for the protection of owners in the enjoyment of their rights in real estate, regardless of what those rights may be. * * * (Footnotes omitted.) 42 AM. JUR.2d *Injunctions*, § 71, p. 815 (1969).

Gregory v. Sanders, 635 P.2d 795, 801 (Wyo. 1981).

The harm to the State of Wyoming and its citizens is irreparable and immeasurable and cannot be remedied by an award of money damages. It is impossible for the State of Wyoming to compute the damages it and its citizens have and will continue to suffer with respect to the loss of use and enjoyment of Hawk Springs State Recreation Area, including hunting, fishing, boating, camping and general recreation. Although the Wyoming Supreme Court has not addressed the issue of whether the public is irreparably harmed by the denial of public access to public lands, the Court of Appeals of Wisconsin, in an unpublished opinion, held that interference with the public’s use of the public’s right-of-way to use public land constitutes an irreparable harm to the town. *Town of Lyndon v. Oines*, 266 Wis.2d 1061, ¶26; 668 N.W.2d 563; 2003 WL 21706622, ***5 (Wis. App. 2003)(attached hereto).

Moreover, monetary damages are not sufficient to compensate the State and its citizens for loss of use and enjoyment of perpetual public access the Hawk Springs State

Recreation Area. The injury to the State and the public resulting from the denial of public access to an area that has been open to the public's use and enjoyment for approximately twenty one years cannot be quantified. The public's access to Wyoming's parks and wildlife is priceless and the intangible benefits of such activities are impossible to quantify.

With regard to easements in particular, the Wyoming Supreme Court held that "injunctive relief is appropriate to prohibit the servient estate owner from interfering with the dominant estate owner's use of his easement." *Weiss v. Pedersen*, 933 P.2d 495, 499 (Wyo. 1997)(citing *Bard Ranch Company v. Weber*, 557 P.2d 722 (Wyo.1976); *Weber v. Johnston Fuel Liners, Inc.*, 519 P.2d 972 (Wyo.1974). When the State of Wyoming gave the HCCD over \$6,300,000 in grants and nearly \$2,500,000 in low interest loans, the State, as contemplated by WYO. STAT. ANN. §§ 41-2-216, *et seq* and the binding project agreements received perpetual public access to Hawk Springs State Recreation Area. As such, the State is merely requesting the servient estate owner, whether that is Phase 23, LLC, or the HCCD, to stop interfering with the State's use of its access which it purchased in the 1980s.

Further, recurring dangerous situations could arise if the Defendants continue to block access to Hawk Springs State Recreation Area. As indicated in the affidavits of William M. Westerfield and _____, the Department of State Parks and Cultural Resources and the Wyoming Game and Fish Department reasonably believe that citizens will still attempt to access Hawk Springs State Recreation Area resulting in altercations between members or employees of the HCCD and/or Phase 23, LLC and the public which could require the assistance of the Goshen County Sheriff's Office. Such altercations could result in a heightened risk of danger to Wyoming's citizens and will burden law enforcement entities in Goshen County. State Parks has already been notified by a Wyoming citizen that he was going to cut the barbed wire fence to gain access into

his favorite fishing hole. The Wyoming Supreme Court has noted the preventive nature of injunction relief when it stated:

“ * * * It would be foolhardy to require that before the granting of an injunction that there be actual physical violence in order to constitute the threat of interference with another’s right enforceable by way of the extraordinary remedy of injunction. One does not have to await the consummation of threatened injury to obtain preventive relief. Injunctive relief is designed not to deal with past violations, but to avoid future wrongs. If injury is certainly impending, that is enough. Prevention of impending future injury is a recognized function of a court of equity. *Cater v. Carter Coal Company*, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936); *Swift & Co. v. United States*, 276 U.S. 311, 48 S.Ct. 311, 72 L.Ed. 587 (1928). * * * ”

Rialto Theatre, Inc. v. Commonwealth Theatres, Inc., 714 P.2d 328, 333 (Wyo.1986)

In this case, the injury to the State of Wyoming and its citizens is not only impending, but ongoing. Each day the public is denied access to Hawk Springs State Recreation Area results in the interference with the public’s right to use and enjoy Hawk Springs State Recreation Area which could result in the public taking matters into their own hands. The grant of a temporary restraining order and preliminary injunction will maintain the status quo regarding public access at Hawk Springs State Recreation Area that has existed since 1985. A preliminary injunction is to preserve the status quo until the merits of an action can be decided. *Simpson v. Petroleum, Inc.*, 548 P.2d 1, 2 (Wyo. 1976).

CONCLUSION

The ongoing harm to the State of Wyoming and its citizens is irreparable, immeasurable and cannot be remedied by an award of money damages. HCCD and Phase 23, LLC, cannot be allowed to deny the public the benefits of what Wyoming taxpayers allocated over \$8,500,000 to purchase - perpetual public access to Hawk Springs State Recreation Area. This Court must grant the State of Wyoming a temporary restraining order and preliminary injunction ordering the removal of the gate and further interference by either HCCD or Phase 23, LLC, with the public's access to Hawk Springs Recreation Area as specifically delineated in WYO. STAT. ANN. §§ 41-2-216 through 41-2-218 and enter a permanent injunction against such further interference.

PRAYER FOR RELIEF

WHEREFORE the State of Wyoming requests a temporary restraining order and a preliminary injunction enjoining the Defendants from denying the public access to Hawk Springs State Recreation Area.

DATED this _____ day of October, 2006.

Patrick J. Crank
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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of October, 2006, the STATE OF WYOMING'S BRIEF IN SUPPORT OF ITS MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND REQUEST FOR HEARING was served by depositing a true and correct copy in the United States mail, postage prepaid, addressed to:

Curtis B. Buchhammer
Buchhammer & Kehl, PC
1821 Logan Avenue

P.O. Box 568
Cheyenne, WY 82003-0568
